Supreme Court, U.S.
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No. 04-1170

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

MICHAEL LEE MARSH, II,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In the case at bar, the Kansas Supreme Court clearly and expressly declared that Kansas' death penalty statute is, on its face, repugnant to the United States Constitution. In the Petition for a Writ of Certiorari, petitioner demonstrated that the decision of the lower court directly conflicts with the Court's decision in *Walton v. Arizona*, 497 U.S. 639 (1990), *overruled sub nom. on other grounds, Ring v. Arizona*, 536 U.S. 584 (2002), and created a conflict with the Ninth Circuit and Supreme Courts of Arizona and Idaho. The petition further demonstrated that the lower court's decision, striking down Kansas' capital sentencing system and calling into doubt the validity of other states' capital sentencing systems, is an important issue that merits the Court's consideration. Respondent does not attempt to deny any of this in his Brief in Opposition. Rather, he devotes his entire brief to the argument that the Court lacks jurisdiction because petitioner did not raise the federal constitutional issue before the lower court. That argument is fatally flawed. The lower court unquestionably passed on the question presented in the petition. Therefore, under 28 U.S.C. § 1257 and the Court's own precedent, jurisdiction to review that decision is satisfied.

1. Under 28 U.S.C. § 1257(a), "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution." In the present case, the Kansas Supreme Court expressly declared that Kansas' death penalty statute, Kan. Stat. Ann. § 21-4624(e), is repugnant to the United States Constitution. Pet. App. 5a Syl. ¶ 25; 21a. This case plainly meets the jurisdictional requirements of 28 U.S.C. § 1257.

The Kansas Supreme Court ruled on the constitutional issue—the question presented in the Petition for a Writ of

Certiorari—in two, mutually supporting, ways. First, the court stated in its syllabus that "the statute is unconstitutional on its face under the Eighth and Fourteenth Amendments." Pet. App. 5a Syl. ¶ 25. In Kansas, the syllabus of the court is considered a statement of the law of the case and part of the binding decision of the court. See Kan. Stat. Ann. § 20-111; Kan. Stat. Ann. § 60-2106(b).[1]

Second, the Kansas Supreme Court reiterated the same in the body of its decision. Under the heading, "CONSTITUTIONALITY OF K.S.A. 21-4624(e)," the court committed several pages to a discussion of the constitutionality of the statute. Pet. App. 17a-21a. The court noted that between respondent's sentencing and appeal, it had decided *State v. Kleypas*, 40 P.3d 139 (Kan. 2001), *cert. denied*, 537 U.S. 834 (2002), in which it determined that the *application* of the statutory weighing equation was unconstitutional. Pet. App. 18a. Quoting from *Kleypas*, the court reiterated why it believed the weighing equation was unconstitutional. *Id.* at 19a-20a. The court specifically addressed the application of *Walton*, *supra*, stating its view "that a majority of the United States Supreme Court has never squarely addressed or decided the facial constitutionality of the equipoise provision before us." *Id.* at 21a. The court concluded its analysis of the constitutionality of the statute by saying, "[a]fter *full reconsideration*, we reject reliance on Justice Blackmun's *Walton* dissent and continue to adhere to the *Kleypas* majority's reasoning and

[1] *See also, e.g., State v. Sims*, 862 P.2d 359, 364 (Kan. 1993) (discussing proper application of a particular syllabus paragraph as precedent); *Umbehr v. Bd. of Wabaunsee County Comm'rs*, 843 P.2d 176, 181 (Kan. 1992) (discussing generally the nature of syllabus paragraphs and their subsequent application in later cases); *In re Estate of Anderson*, 865 P.2d 1037, 1042 (Kan. Ct. App. 1993) ("We base our decision on a point of law stated in the Supreme Court's syllabus in *Burcham*."); *In re Lett*, 640 P.2d 1294, 1300 (Kan. Ct. App. 1982) (Abbott, P.J., concurring) ("Although it has been argued by some members of this court that the holding in question is dicta, the disputed language is contained in the law of the case at syllabus P 2.").

holding that K.S.A. 21-4624(e) *as written* is unconstitutional under the Eighth and Fourteenth Amendments." *Id.* at 21a (emphasis added). There can be no doubt that the Kansas Supreme Court believed that the constitutional issue now raised was before it and that it announced a holding on that issue.

2. The crux of respondent's argument in opposition is that the constitutional issue now raised by petitioner was not presented to the lower court. However, even if that were true, it would not deprive the Court of jurisdiction. The Court stated in *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam), that "we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was *either* addressed by, *or* properly presented to, the state court that rendered the decision we have been asked to review." (emphasis added). Thus, even if the issue was not properly presented before the lower court, the fact that the lower court addressed the constitutional issue and rendered a decision based on the Constitution is sufficient to confer jurisdiction on the Court to review the matter.

Indeed, it is well settled in a long line of decisions of the Court that "[a] ruling on the merits of a federal question by the highest state court leaves the federal question open to review." *Franks v. Delaware*, 438 U.S. 154, 161 (1978). As far back as 1914, the Court recognized its authority to review federal questions decided by state courts, even though a particular federal question "had not been expressly asserted below." *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134 (1914). The Court observed that, "it is irrelevant to inquire how and when a Federal question was raised in a court below when it appears that such question was actually considered and decided." *Id.* This was reiterated in *Raley v. Ohio*, 360 U.S. 423, 436 (1959) ("There can be no question as to the proper presentation of a federal claim when the highest state court passes on it."); *Orr v. Orr*, 440 U.S. 268, 274-75 (1979) (quoting *Manhattan Life*, *supra*); and *Payton v. New*

York, 445 U.S. 573, 582 n.19 (1980) ("Although it is not clear from the record that appellants raised this constitutional issue in the trial courts, since the highest court of the State passed on it, there is no doubt that it is properly presented for review by this Court."). The Court has jurisdiction to review the Kansas Supreme Court's holding that the Kansas death penalty statute violates the Eighth and Fourteenth Amendments.

3. In all events, and contrary to respondent's assertion, the constitutionality of Kan. Stat. Ann. § 21-4624(e) was raised in the lower court—by respondent. *See* Pet. App. 19a ("Marsh makes the further argument, however, that K.S.A. 21-4624(e) is unconstitutional on its face . . ."). Before the Kansas Supreme Court, respondent argued that the statute was unconstitutional on its face, and petitioner argued that it was not.

The litigation strategy of the parties can only be understood by recognizing the role of *State v. Kleypas* in the decision below. The *Kleypas* court addressed the very arguments presented here and rejected petitioner's contention that the weighing equation in Kan. Stat. Ann. § 21-4624(e) was constitutional under *Walton v. Arizona*, *supra*. Pet. App. 96a–119a. Instead of holding that the statute was unconstitutional on its face, however, the court held that the statute should be construed to provide that the death penalty can be imposed only when the aggravating circumstances outweigh the mitigating circumstances. The Court ruled that, "[s]o construed, we hold that K.S.A. 21-4624 does not violate the Eighth Amendment prohibition against cruel and unusual punishment." Pet. App. 119a. Accordingly, petitioner could not seek the Court's review of the lower court's conclusion in *Kleypas* given that the statute was ultimately construed to be constitutional.

By the time the instant case came before the Kansas Supreme Court, there was no federal constitutional issue for petitioner to raise. The statute, as definitively construed in

Kleypas, did not suffer from the purported constitutional problem of requiring that death be imposed if the aggravating and mitigating evidence are in equipoise. Petitioner can hardly be faulted for not asserting the federal constitutional issue which became relevant only after the Kansas Supreme Court overruled its earlier construction of the statute.

Respondent's principal contention in this case was that the statute was unconstitutional on its face under the Eighth and Fourteenth Amendments, and that by construing the statute to be constitutional in *Kleypas*, the court violated the separation of powers doctrine and the guarantee of a republican form of government set forth in Article IV, section 4, of the United States Constitution. BIO App. 8-10. In response, because *Kleypas* was binding precedent, petitioner was forced to take the position that, while it desired a different outcome in *Kleypas*, the issue had been decided and *Kleypas* was now the law. Accordingly, petitioner did not reiterate the very same arguments that the lower court had rejected in *Kleypas*, but rather maintained that the statute was constitutional as determined in *Kleypas*.

Petitioner could not reasonably foresee that the lower court would reopen the constitutional issue it had so recently decided. As the Chief Justice of the Kansas Supreme Court noted in her dissent in the present case, "the *Kleypas* court unanimously upheld the constitutionality of K.S.A. 21-4624(e)." Pet. App. 69a, and, "[o]ur decision in *Kleypas* is a mere 3 years old, and nothing this court has said in the interim has evidenced our intention to abandon its underlying principles." *Id.* at 74a. Further, she noted, "there has been nothing in the jurisprudence of the United States Supreme Court during that time to show that our decision in *Kleypas* was incorrect." *Id.* at 74a-75a. Under the circumstances, petitioner could not reasonably foresee that the lower court would exhume and rely upon the same arguments it considered in *Kleypas*. However, the court

below did, and in doing so, squarely passed upon the federal constitutional question presented here.

4. In any event, none of the described history affects the Court's jurisdiction as the lower court unquestionably held that the statute at hand was repugnant to the Constitution of the United States. Jurisdiction has clearly been satisfied and review by the Court is therefore warranted.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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